

1 THE HONORABLE THOMAS S. ZILLY
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6 U.S. DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON

8 STRIKE 3 HOLDINGS, LLC, a Delaware
9 corporation,

10 Plaintiff,

11 vs.

12 JOHN DOE, subscriber assigned IP
13 address 73.225.38.130,

14 Defendant.

15 NO. 2:17-cv-01731-TSZ

16 **REPLY IN SUPPORT OF
17 DEFENDANT'S MOTION TO
18 COMPEL PRODUCTION OF
19 SOFTWARE OR EXCLUDE EXPERT
20 AND LAY TESTIMONY WHICH
21 DEPENDS ON ITS RELIABILITY**

22 JOHN DOE subscriber assigned IP
23 address 73.225.38.130,

24 Counterclaimant,

25 vs.

26 STRIKE 3 HOLDINGS, LLC,

27 Counterdefendant.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO
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CASE No. 2:17-cv-01731-TSZ

I. REPLY INTRODUCTION

Strike 3 has the burden of proof on Doe's declaration of noninfringement counterclaim, which requires Strike 3 (not Doe) to prove that Doe copied Strike 3's films. Strike 3's ability to prove Doe copied its films depends entirely on the accuracy and reliability of software developed by Ben Perino, a witness the Court has already held is not qualified to provide expert testimony.

Because Strike 3 carries the burden of proof, the Court should require Strike 3 (not Doe) to gather the evidence it needs to meet its burden. Strike 3 should be required to track down the software used by IPP, the vendor that Strike 3 hired to drag Doe into Strike 3's baseless lawsuit. If Strike 3 is not willing to obtain the software from IPP—voluntarily or by subpoena—it should not be allowed to introduce testimony or other evidence that references the software.

Doe respectfully requests that the Court grant his motion to compel Strike 3 to obtain the IPP code, or alternatively, to exclude any evidence regarding the IPP system, including the testimony of Stephen Bunting, Patrick Paige, Tobias Fieser, John Pasquale, and Susan Stalzer.

II. AUTHORITY AND ARGUMENT

A. Strike 3 should be required to obtain the software from IPP.

Strike 3 has the burden to prove that Doe copied Strike 3's films even though it's Doe's counterclaim for declaration of non-infringement. *Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp. 3d 975, 984 (C.D. Cal. 2015) ("[J]ust as in *Medtronic*, there is no reason to relieve the alleged owners of the intellectual property of the usual burden of proof just because they are nominally the defendants in this declaratory judgment action") (citing *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 198-201 (2014)); see also *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (describing the copyright infringement elements of ownership and copying). Strike 3's infringement claim alleged that IPP used

1 proprietary software to conclude Doe had copied Strike 3's films. Strike 3 cannot meet its
 2 burden of proof if it doesn't have the software.

3 Strike 3 does not explicitly dispute that it carries the burden of proof on the
 4 counterclaim for declaration of non-infringement but suggests that Doe should be responsible
 5 for obtaining the very code Strike 3 needs to meet its burden. Strike 3 goes so far as to posture
 6 that "had they asked," Doe's counsel would have learned that "Strike 3's counsel had been
 7 authorized to accept service of process of the subpoena." ECF 100 at 2. But the very purpose
 8 for the parties' March 7th telephone call was to discuss how Doe could access the software.
 9 Strike 3 never mentioned it could accept a subpoena during the call, or in subsequent email
 10 exchanges. Declaration of Adrienne McEntee ("McEntee Decl.") ¶¶ 5-6. And Strike 3's recent
 11 Rule 30(b)(6) testimony contradicts its newfound position that it was always willing to work
 12 with Doe to get the code. Although the parties met and conferred over a month ago, Strike 3
 13 admitted that the company did not ask IPP for the code until last week. *Id.*, Exh. B at 196:6-19.

14 Strike 3 argues that because the terms of its contract with IPP do not give Strike 3 the
 15 rights to IPP's software, it cannot obtain and produce IPP's software to Doe. But the contract
 16 says nothing about the scope of Strike 3's relationship with IPP and IPP's cooperation. And
 17 Strike 3's testimony about the relationship was puzzling at best. Strike 3's Rule 30(b)(6)
 18 witness, Jessica Fernandez, testified that her primary contact at IPP is Tobias Fieser. Mr.
 19 Fieser's declarations were used to obtain early discovery in many of Strike 3's 3,000-plus
 20 lawsuits. McEntee Decl. ¶ 14. Yet Ms. Fernandez was unable to offer any details about her
 21 contact with Mr. Fieser, including how often they spoke or exchanged emails. McEntee Decl.,
 22 Exh. B at 196:25-197:23.

23 Strike 3 also implies it will be easy for Doe to get the code from IPP. But there is no
 24 evidence to support Strike 3's assertion. Strike 3 testified that in the past Doe's counsel
 25 "routinely issued a subpoena to IPP and my office would accept service on IPP's behalf." ECF
 26 102 ¶ 6. Before this case, Terrell Marshall Law Group had never dealt with Strike 3's lawyers,

1 and Mr. Edmondson searched his records and found no evidence that he ever issued a subpoena
 2 to IPP. McEntee Decl. ¶ 17; Supplemental Declaration of J. Curtis Edmondson Decl. ¶ 2. Nor
 3 has IPP has never voluntarily “produce[d] its software for inspection within a reasonable time,”
 4 as Strike 3 claims. ECF 102 ¶ 6. Mr. Edmondson has had access to the MaverickEye code in
 5 the past, but only because court orders compelled its production. Edmondson Decl. ¶ 3.

6 Strike 3’s distractions do not alter the legal landscape. Strike 3, not Doe, has the burden
 7 of proof to show that Doe copied Strike 3’s films. If Strike 3’s claim that it has no access to
 8 IPP’s code is true, Strike 3 should send a subpoena to IPP. Should Strike 3 fail to obtain the IPP
 9 code, Strike 3 will be unable to prove the copying element of Doe’s counterclaim at trial.

10 **B. Documented problems with reliability underscore why Strike 3 must obtain and
 11 produce the software.**

12 The Court is well-aware of the problems with Benjamin Perino, the CEO of GuardaLey,
 13 and the software he created. *See Venice PI, LLC v. Sean O’Leary Jr., et al.*, C17-0988 TSZ, ECF
 14 34 (Jan. 8, 2018) (holding Mr. Perino “does not have the qualifications necessary to be considered
 15 an expert in the field in question, and his opinion that the surveillance program is incapable of
 16 error is both contrary to common sense and inconsistent with plaintiff’s counsel’s conduct in
 17 other matters in this district”); *Id.* at ECF 27 (noting that Mr. Perino’s IP address-tracking
 18 software was used to support two lawsuits against a 91-year-old man who suffered from dementia
 19 and was mentally and physically incapable of operating a computer).

20 The software problems include a history of false positives. Dr. Kal Toth analyzed Mr.
 21 Perino’s software, which GuardaLey licensed to MaverickEye, and concluded the software had
 22 at least a known error rate of 11%. ECF 83 at p. 10. GuardaLey also licenses software to IPP.
 23 ECF 95, Exh. 7 ¶ 15. Because of this connection, Strike 3 speculates that the IPP and
 24 MaverickEye software is the same, and argues that because of Dr. Toth’s prior analysis of
 25 MaverickEye, Doe should have no reason to analyze the IPP code. But Strike 3’s expert,
 26 Stephen Bunting, was “never given access to IPP’s source code, object code, third-party
 27 software licenses, build files, or validation test files for the software.” ECF 102 ¶ 5. Strike 3

1 must compare the IPP and MaverickEye codes before it can determine the software is
 2 identical.

3 **C. The Court should exclude unreliable expert and lay testimony.**

4 In the Ninth Circuit, the trial court acts as a “gatekeeper” by assessing the soundness of
 5 the expert’s methodology to exclude junk science. *Estate of Barabin v. AstenJohnson, Inc.*, 740
 6 F.3d 457, 463 (9th Cir. 2014). As gatekeeper, the Court may exclude opinions that rely on
 7 suspect data. *Slack v. Swift Transportation Co. of Arizona, LLC*, No. C11-5843 BHS, 2017 WL
 8 3503345, at *6 (W.D. Wash. Aug. 16, 2017) (excluding expert testimony as unreliable when
 9 based on “suspect” data). The Court has already found that the testimony of Ben Perino,
 10 including his opinion that the surveillance program is incapable of error, is unreliable. See
 11 *Venice PI, LLC, supra*. Strike 3 relies on experts who, in turn, rely on Mr. Perino and his
 12 software. Their testimony should also be excluded.

13 The tests that Strike 3’s expert Stephen Bunting ran on the MaverickEye code and his
 14 opinion about those tests should be excluded because they depend on the reliability of the
 15 software. Mr. Bunting relied on a report Mr. Perino wrote regarding the software’s features and
 16 functions to conclude that the software works in the same manner as other software Mr.
 17 Bunting has used. ECF 95, Exh. 7 ¶¶ 18-19. Because Mr. Bunting’s testimony depends on the
 18 reliability of the IPP code, and Mr. Perino has not established the reliability of his software
 19 (whether it is the MaverickEye code or IPP code), Mr. Bunting’s opinion regarding the
 20 accuracy of the any software developed by Mr. Perino should be excluded. Similarly, Patrick
 21 Paige’s opinion endorsing IPP’s infringement detection system should be excluded because his
 22 tests also depend on the accuracy of the code. ECF 95, Exh. 6.

23 Finally, the testimony of John Pasquale, Susan Stalzer, and Tobias Fieser should be
 24 excluded. Each witness provided testimony that cannot be “rationally based on the perception
 25 of the witness.” Fed. R. Evid. 701. Recent testimony by Mr. Pasquale and Ms. Stalzer exposed
 26 material omissions and misrepresentations in the declarations used to obtain early discovery.

1 For example, in the declaration Strike 3 submitted on behalf of Mr. Pasquale in support of its
 2 motion for early discovery, Mr. Pasquale testified that the PCAP he analyzed came directly
 3 from IPP. ECF 4-4 ¶ 7. But at his deposition, he admitted he had never communicated with IPP
 4 by email or otherwise. McEntee Decl., Exh. E at 18:19-19:8.

5 Ms. Stalzer's deposition testimony is more concerning. In the declaration Strike 3
 6 submitted on her behalf, Ms. Stalzer testified both that IPP sent her infringing motion picture
 7 files on Exhibit A to the complaint and that she verified that the infringing files matched Strike
 8 3's motion pictures. ECF 4-5 ¶¶ 7-10. But in her deposition, she admitted that contrary to her
 9 declaration, IPP did not provide her with any files directly. She believes the files came from
 10 IPP because "it has been told to me that that is where the films come from that get voted into
 11 the verification center." McEntee Decl., Exh. D at 102:10-20. Moreover, she was never asked to
 12 verify Exhibit A to the Complaint, let alone any exhibit to any of Strike 3's complaints. *Id.*,
 13 Exh. D at 66:14-68:22 (Q. Have you ever been asked to verify any exhibit on any complaint...
 14 A. No.). Instead she viewed files with a separate software platform at Strike 3 called the
 15 "verification tool," which Strike 3 has never disclosed. *Id.*, Exh. D at 22:20-34:15. Ms. Stalzer
 16 was unable to explain why the declaration she "did not write" did not mention verification tool,
 17 other than she assumed "the attorneys know the best way to draft the declarations." *Id.*, Exh. D
 18 at 116:23-117:23.

19 Strike 3 should not be able to introduce testimony which depends on unreliable software
 20 and an undisclosed verification system, let alone testimony by witnesses who have
 21 unambiguously testified that their prior declarations were false.

22 **D. Strike 3 should not be entitled to fees and costs.**

23 Doe was substantially justified in bringing this motion which addresses whether the IPP
 24 code must be produced, and if not, whether evidence of the IPP code may be admissible. But
 25 for Strike 3's decision to hire IPP to investigate Doe, and Strike 3's subsequent decision to sue
 26 and seek early discovery regarding Doe, Doe would never have been caught up in this litigation
 27

in which he was falsely accused of downloading pornography. Strike 3's request for fees and costs should be denied.

III. CONCLUSION

For the reasons set forth in Doe’s opening brief and in this reply, Doe respectfully requests that the Court compel Strike 3 to obtain the IPP code. Alternatively, Doe asks that the Court prohibit Strike 3 from introducing evidence related to the IPP code.

RESPECTFULLY SUBMITTED AND DATED this 19th day of April, 2019.

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CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on April 19, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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1 DATED this 19th day of April, 2019.

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